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MOTION FILED SEP 18 1947

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 6 ORIGINAL

UNITED STATES OF AMERICA, *Plaintiff*,

v.

STATE OF CALIFORNIA

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN OPPOSITION TO THE MOTION FOR LEAVE TO FILE PETITION AND PETITIONS FOR REHEARING AND RECONSIDERATION OF THE MAJORITY OPINION.

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September, 1947

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 12—ORIGINAL

UNITED STATES OF AMERICA, *Plaintiff*,

v.

STATE OF CALIFORNIA

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN OPPOSITION TO THE MOTION FOR LEAVE TO FILE PETITION AND PETITIONS FOR REHEARING AND RECONSIDERATION OF THE MAJORITY OPINION.

Robert E. Lee Jordan moves the Court for leave to file a brief as Amicus Curiae in opposition to the motion of the State of California for rehearing and reconsideration of majority opinion filed by the State of California

July 18, 1947, and in support of the majority opinion upon the grounds that certain laws, pertinent and material facts, not heretofore before the Court, and which are believed to be vital to the issues raised, may assist the Court in considering the motion for rehearing and justify the Court in denying the motion filed by the State of California.

ROBERT E. LEE JORDAN,
As Amicus Curiae.
JAMES E. WATSON.
ORIN DEMOTTE WALKER,
Counsel for Amicus Curiae.

September 12, 1947.

BRIEF OF AMICUS CURIAE IN SUPPORT OF THE MAJORITY OPINION.

STATEMENT.

The petition of the defendant, the State of California, for a rehearing and reconsideration of the majority opinion, in the instant case, is predicated upon the assumption that the defendant has established a valid legal claim of title to the submerged lands off the coast of California and the oil in them.

The brief of California and the arguments of its learned Counsel before this Court, failed to establish in the minds of the majority of this Court, any right or title to or ownership of the submerged lands off the coast of California, or to the oil or minerals in them.

In order to justify the Court in reconsidering its opinion in the instant case, it would appear essential that incontrovertible facts in support of its assumption of title, be presented in its petition for such reconsideration. The petition does not reveal any such facts, but advances only arguments based upon the unproved assumption of title to submerged lands in the defendant-petitioner.

There were several ways by which California might have been able to obtain or claim a right or title to the submerged lands, and minerals in them.

First: By a compliance with the procedure set out in the Internal Improvement Act of 1841, which provides for grants of lands to the new States. The pertinent provisions of that Act are as follows:

> "Grant to new States. There is granted for purposes of internal improvement, to each new State admitted into the Union after September 4, 1841, upon such admission, so much public land as, including the quantity that was granted to such State before its admission and while under a territorial government, will make five hundred thousand acres.
>
> "Sections and locations of lands. The selections of lands, granted in this section, shall be made within the

limits of each State so admitted into the Union, in such manner as the legislature thereof respectively, may direct * * * The locations may be made at any time *after the public lands* in any such new State *have been surveyed* according to law." (R. S. paragraphs 2378, 2379) U. S. C. A. Title 43, Chap. 20. Para. 857, Pages 121, 122.

Second: By California having been a party to the Treaty of Guadaloupe Hidalgo in 1848, under which, Mexico ceded to the United States Government all of the territory now embraced in the boundaries of California.

Third: By the provisions of the Enabling Act of 1850, which admitted California to the Union on an "equal footing with the original states" and

Fourth: By specific acts of Congress, granting to the State of California the submerged lands and the minerals in them.

ARGUMENT.

Under the Act of 1841, Congress set a limit of five hundred thousand acres to each new State, subject to selection by the legislature of the new State, but *only after the land had been surveyed by the Government.* Shortly after the admission of California to the Union in 1850, Congress passed an Act for the purpose of settling the claims of Mexican and Spanish grantees, to land in the territory comprising California, these grants the Federal Government, by Treaty, agreed to recognize. This Act of March 3, 1851, Vol. IX, U. S. Stat. L. 631, provides, under Section 13, as follows:

"* * * and be it further enacted that all lands, the claims to which have been finally rejected by the commissioners in manner herein provided, which shall be finally decided to be invalid by the District or Supreme Court, and all lands the claims to which shall not have been presented to said commissioners within two years after the date of this Act shall be *deemed, held, and considered as part of the public domain of the United States.*"

Under this section, California was not able to select any land within its borders, until after these Mexican and Spanish claims had been determined. The Act allowed a period of two years for this purpose, and further extended the time, within which selections could be made, up to 1853. The legislature of California was still unable by the limitations of the Act 1841 to make its selections, subsequent to that date, until after the territory had been surveyed by Government Surveyors.

According to the report of the Department of Interior, California made no selections of land, under the Act of 1841, until 1855, and no allocation of the land, which had been selected by California, was made by the Land Department of the Department of Interior until 1865. The proof of this fact is found in the following letter:

"United States Department of the Interior
Bureau of Land Management
Washington 25, D. C.

Ref. 8852 "F" August 13, 1947

Orin deMotte Walker, Esq.
815 15 Street, N. W.
Washington 5, D. C.

My dear Mr. Walker:

Reference is made to your letter of August 5, 1947, concerning lands selected by the State of California under the Act of September 4, 1841.

It appears from the records of this Bureau, that the first selection under the Internal Improvement Act was filed May 9, 1855. Other selections were also made and included in the first approved list December 19, 1865.

Very truly yours,

For the Director:
SGD: Andrew Markhus
Chief, Reclamation and
Land Grant Division."

It must be emphasized that the Act of 1841, did not specify or include grants of rivers, harbors, bays, ports, lakes,

or inland waters to the new States; and, unless the legislature of California selected these various bodies of waters or streams, as a part of the donation of five hundred thousand acres, the wording of the Act did not pass title to the State of California to any of these things. The petition of the defendant is silent on this point.

The next question which arises is whether or not these various bodies of water were surveyed by the Government surveyors, so that it would have been possible for the legislature of California, had it so desired, to select any of these bodies of water or streams as a part of its five hundred thousand acres of allocated or donated land. This point is likewise by-passed. As far as the tide and submerged lands are concerned, these lands, according to the records of the Department of Interior, never have been surveyed; hence, it would have been impossible for California to have selected any submerged lands at the time of the passage of the Enabling Act in 1850, and equally impossible to select them today, even if their quota of five hundred thousand acres was not exhausted, for they are still unsurveyed.

That California did not, through its legislature, select any tide or submerged lands is evident from the following letter of the Department of the Interior:

"Department of Interior
General Land Office
Washington, D. C.

August 5, 1942
Land grants made to
the State of California

1927709 "F"

Messrs. Watson & King
Attorneys-at-law
Bowen Building
Washington, D. C.

Gentlemen:

I have your letter of July 14, 1942, in which you refer to our letter of July 10, addressed to Mr. Robert E. Lee

Jordan, concerning land grants made to the State of California.

In the case of most of the land grants, the State makes selection of the public lands desired and the selections, if found to be allowable in all respects, are approved by this Department and certified to the State, such approval and certification being equivalent to the issuance of a United States patent. See U. S. 102; 51 Law D. 566.

* * * * * * * * *

This office in the past has not knowingly patented to the State of California any land shown by our records to be tidal or submerged lands and we do not find any record of any such application for tidelands as swamp and overflowed lands.

Very truly yours,

SGD: JOEL DAVID WOLFSOHN
Assistant Commissioner."

From the foregoing facts, and the cited law, it is evident that California did not acquire any title to submerged lands by virtue of the Act of 1841. There is likewise no evidence that the Act of 1841 granted California any rights, title, or interest to any port, bay, harbor, river, lake, or other inland waters.

The following citations supply further evidence on the point:

"The grant to California of five hundred thousand acres of land took effect immediately upon admission of the State. It gave to her at once, not a title to any specific land but an interest in the designated quantity to be afterwards selected out of any public lands." Doll v. Meador, 1860 16 Cal. 295.

"The various actions of Congress preserving portions of the public lands of the United States to the territories or States for the benefit of their people vest the title of such lands in the territories or states when the lands are surveyed, but until such time, the obligation is executory, and the title remains in the Federal Government." Ferry v. Street, 119 U. S. 385; Heydenfeldt v. Daney Gold and Silver Mining Company, 93 U. S. 634, 640, 23 Law Ed. 995.

"A state has no right to select and locate the lands granted it until after the lands have been surveyed by the Federal Government." Terry v. Megerle, 1864, 24 Cal. 609, 85 Am. Dec. 84.

"No valid selections can be made until after the land selected has been surveyed by the proper officers of the United States nor except in the manner prescribed by the legislature of the State." Hastings v. Jackson, 1873, 46 Cal. 234.

"Selections made before Survey. A State selection of land granted by Congress, made before it is surveyed by the United States, is invalid." Chant v. Reynolds, 49 Cal. 213.

"Lands selected by the State do not become the property of the State under this section until the selection has been certified over to the State by the Commissioner of the General Land Office." Buhne v. Chism, 48 Cal. 467.

"In the surveys, public lands bordering on navigable waters, shore lines are meandered and in general on Government grants and conveyances thereof give title only to land above line of high water." United States v. Ashton, 220 U. S. 694, 55 Law Ed. 605.

California does not advance in support of her claim to title to the submerged lands or the harbors, bays, rivers, lakes and other inland waters, that these lands had been surveyed or had been selected by the legislature of California prior to, or at the time of the passage of the Enabling Act, and without proof of these essential facts to establish a valid legal right, there are no grounds upon which California can establish title to the submerged lands, or the minerals in them under the Act of 1841, or as a basis for a reconsideration of the majority opinion.

The second way by which California might have been able to claim an interest in tide and submerged lands was under the Treaty of Guadaloupe Hidalgo of 1848. No claim of title or interest had been advanced by California, so far, under the terms of the Treaty, as California did not exist, even as a territory, at the time of the making of the Treaty and could not have been a party to it.

As to the third possibility, for its claim to title, under the Enabling Act, it must be pointed out that the procedure by which California was to receive land, under that Act, was based upon the provisions of the Act of 1841. The grant of five hundred thousand acres, was subject to selection by its legislature and confirmation by the Land Department of the Department of Interior, *after survey.*

The Treaty of Guadaloupe Hidalgo transferred to the United States Government the title, or full property rights in and to all the territory ceded, except certain tracts which had been previously granted by the Governments of Mexico and Spain to their respective citizens. These tracts, the Federal Government never owned and could not transfer. Some of these tracts were bordered by the sea, which included the tidelands. These tidelands, likewise, were never transferred to the Federal Government and the Government could not by virtue of the Enabling Act or any other Act transfer to the State of California, property which it did not own.

If it be held that the original States owned their tide and submerged lands, it becomes clear that the Federal Government in admitting California on "an equal footing" with those states, did not contemplate the transfer of property, it did not own, but which California now claims, by the Enabling Act. It was barred from doing so by the provisions of the Treaty. The conclusion must be that the Enabling Act granted only the same political sovereignty as the original states possessed, and only those, which under the Constitution, Congress was able to grant (Constitution, Article IV, Section 4) and the transfer of property could only be made under the procedure set out in the Act of 1841.

That the foregoing was definitely the intention of Congress is further buttressed by the Act of 1851, which states:

> "all lands the claims to which shall not have been presented to said commissioners within two years after the date of this Act shall be *deemed, held, and considered as part of the public domain of the United States.*"

The provision of the Act, passed after California had been admitted to statehood, and before any survey or selections had been made by California was an unqualified and complete appropriation, made by Congress, of all property rights, interest and title to all of the territory ceded by Mexico and included all which composed the State of California. This fact will enable this Court, if it so desires, to hold that in addition to the grounds upon which it based its opinion, in the instant case, that the full property rights and title to the territory including the submerged lands off the coast of California were by Act of Congress, vested in the Federal Government, and thus, to finally dispose of all questions regarding the title, rights and ownership of the Government in and to all of the said territory, and the minerals in them.

The Enabling Act further provides that

> "California is admitted into the Union upon the express condition that the people of the State, through their legislature, or otherwise, shall never interfere with the primary disposition of the public land within its limits and shall pass no law and *do no act whereby the title of the United States* and rights to dispose of the land *shall be impaired,* or questioned."

In the light of this provision, a question very properly arises as to whether or not the State of California, since 1929 at least, is living up to the obligations which it assumed under the provisions of the Enabling Act. Has not California violated the provisions of the Enabling Act with reference to the rights of the Government in the public lands? Is it not at this time, before this Court, questioning title to certain parts of the territory, which by Act of Congress were appropriated to the Federal Government? Has it not been and is it not now issuing leases for the taking of minerals, which it has been the policy of the Government to reserve, without respect to the provisions of the Enabling Act, to the loss and damage of the Federal Government?

The Enabling Act also provides that

> "Nothing herein contained shall be construed as *recognizing or rejecting* the propositions tendered by the people of California as articles of compact in the ordinance adopted by the convention which formed the Constitution of that State." Vol. IX, Stat. L. 453.

The unusual provision in the Enabling Act raises a very interesting question as to the validity of any claims which California might make as to property rights, in the State, under the Enabling Act, and that it has no rights which are not covered by the Acts of 1841, 1851 and other specific acts relating to grants of property to California. Whether Congress was suspicious of the good faith of California, or not, it was definitely unwilling to go on record by confirming the provisions of its Constitution and ordinances, and certainly failed to do so. This action might even raise the question as to whether or not Congress intended to admit California to statehood on "an equal footing with the original states."

It does not appear that the defendant has any rights to the submerged lands or minerals in them, which can be safely based upon the Enabling Act as being a grant of title to any land within the State.

As to the fourth possibility, California has not presented to this Court any evidence of any Act of Congress granting to it any submerged lands, marginal sea or belt, or minerals, or the specific harbors or bays set out in the stipulations, or other inland waters of the State. California cannot, therefore, advance any claim to rights or title in the subject matter of the instant action, upon the basis of any congressional grants known to Amicus Curiae.

It is believed that the foregoing constitute the only ways by which California could have obtained title to the submerged lands, and it appears that under none of these ways has or did California secure title to the lands and minerals embraced in the instant litigation, and that there are, therefore, no grounds upon which to base the petition for rehearing by this Court.

DISCUSSION OF THE POINTS ADVANCED BY THE DEFENDANT AS GROUNDS FOR A REHEARING AND RECONSIDERATION OF THE MAJORITY OPINION.

The defendant advances the following proposition as being pertinent to the majority opinion in the instant case:

> "The constitutional grants to the National Government of governmental powers, including the power over external affairs, do not carry with them any cession of territory, and do not necessitate the ownership of, or dominion (in a proprietary sense) over, property within a State."

This proposition, when standing alone, raises an interesting question, but when it is suggested as having any bearing on the instant case, it becomes academic and moot.

In order for the proposition to be analogous to the instant case, it is essential that California have undisputed title to the property covered by the action. The facts and the law hereinbefore submitted, clearly establish the lack of title in the defendant. The complaint of the Government does not seek the cession of any territory from the State of California, to which California has, under the law, any claim. It is not necessary to institute proceeding to quiet title or Eminent Domain, when the Government owns the property, and the question of constitutional grants to the National Government does not arise in the instant case.

The particular finding of the majority opinion, on page 13, which states:

> "* * * And in so far as the nation asserts its rights under International Law, whatever of value may be discovered in the seas next to its shores and within its protective belt, will most naturally be appropriated for its use."

is objected to. In support of this portion of the majority opinion the following is cited: "The Law of Nations, which

the United States makes a part of the supreme law of the land, recognizes the marginal belt, three miles off the coast, as part of the national territory of the United States and not the territory of any particular State." (*Church* v. *Hubbart*, 2 Cranch 187, 234; *in re Cooper*, 143 U. S. 472. The Supreme Court, in the case of *Cunard S. S. Co.* v. *Mellon*, 262 U. S. 100 at 122 states:

> "It is now settled in the United States and recognized elsewhere, that the territory subject to its jurisdiction include the land areas under its dominion and control, and ports, harbors, bays, and other enclosed arms of the sea along its coast to a marginal belt of the sea extending from the coast line oceanward a marine league, or three geographical miles."
>
> (*The Ann*, 1 Fed. Cas. 926; *U. S.* v. *Smiley*, 27 Fed. Cas. 1132; *Manchester* v. *Massachusetts*, 139 U. S. 240, 257-258; 1 Kents Com., 12th Ed. 29; 1 Moore International Law Digest, Chap. 145; 1 Hyde International Law, Paras. 141, 142, 154; Wilson's International Law, 8th Ed. Para. 54; 1 Oppenheimer's International Law, 3rd Ed. Paragraphs 185, 189, 252.)

The fact that Counsel for the Government over-emphasized the rights of the Government under International Law does not preclude the possibility of the finding of the majority of the Court, being based in part upon the laws and facts as hereinabove cited. The International phase of the case was doubtless a cause for the emphasis which the majority of the Court relied upon in the opinion.

The Federal Government was the original proprietor of the land in almost every State other than the original states and Texas. What land is owned by California, at this time, is by virtue of Acts of Congress. What was not granted to California is still owned by the Government. Had the defendant been granted submerged lands and the minerals in them, and had the suit of the Government been in the nature of a taking away of lands granted to California, and

requiring the State of California to cede them to the Government, then the proposition, advanced as Argument I by the defendant, might be applicable. The Government, however, did not seek a judgment asking for a cession of any territory, which under any law or Congressional grant, had been transferred to the defendant. The Government has always owned the property covered by the opinion. What was sought in the instant action was the declaration of the rights of the Government as against a trespasser, which was not the owner of the property.

This action did and does not deprive the State of California of any property which it owns.

The liability of a trespasser is very forcefully described in the Opinion of the Court in the case of *U. S.* v. *Wyoming, et al.*, which was decided in June of this year, and which appears on Page 17 of the Advanced Sheet Opinion in that case:

> "An agreed premise is found in the rule that one who 'wilfully' or in 'bad faith' trespasses on the land of another, and removes minerals, is liable to the owner for their full value computed as of the time the trespasser converted them to his own use, by sale or otherwise * * * The 'good faith' contemplated by these rules is something more than the trespasser's assertion of a colorable claim to the converted minerals."

The proposition submitted has no bearing on the instant litigation, does not arise under the law and facts of the case, and presents no question which would be a ground for a rehearing or reconsideration of the majority opinion.

The second argument presents the following statement:

> "The Court has heretofore squarely rejected, in an opinion of Mr. Justice Holmes, the very same contention that ownership by the National Government of the beds of international waters is a necessary corollary of the National Government's full power over external affairs."

The facts in the instant case are not primarily concerned in the ownership by the Government of the beds of international waters. It is not believed that the question of the marginal belt or sea is analogous to an international boundary line; or that, the above proposition is in any way related to the instant case.

The opinion of Mr. Justice Holmes is always given the greatest consideration and while, as stated on Page 13 of the petitioner's brief, the Justice stated with reference to the cited case:

> "We see no plausible ground for the claim of the United States."

We are also forced to take into consideration the change in world conditions and there is no assurance that the honored Justice would make the same remark today. However, the majority opinion is not based exclusively upon the proposition of international law, which is readly discernible by a careful reading of the opinion. By virtue of the ownership of the territory covered by the action, Argument II, advanced by the defendant, is moot and inapplicable.

The defendant advances as Argument III the following proposition:

> "Territory may not be annexed to the United States or acquired by the National Government by action of the Executive Department but only by Congressional action.
>
> "The only declaration the State Department has ever made upon the issue of Federal and State ownership of submerged lands under the three-mile belt is directly opposed to the majority opinion in this case."

The defendant, in his argument above stated, has overlooked the action of Congress under the Act of 1851, whereby all of the territory out of which California is comprised was appropriated by the Federal Government and

that this action included all the territory ceded by Mexico; that the Treaty which ceded that territory was made by the Government of the United States and not by the act of any Executive Department. With these facts in mind, it is clear that the declaration of President Truman was not responsible for the appropriation by Congress in 1851 of the marginal belt, submerged lands, and the minerals, of the Mexican grant. There is, therefore, no arguable point in support of the above proposition which would justify any rehearing of the instant case.

Replying to Argument IV of the defendant, which presents the following proposition:

> "Decisions of 100 years or more standing declare and hold that the original thirteen States and not the National Government own the marginal belt along their coasts."

It is not vital to the issue involved in the instant case that the question of whether or not the original thirteen states owned the marginal belt along their coast. If the marginal belt along the coast of California was not granted to it by Congress, or the laws passed by Congress, California would still be without title to the marginal belt, for after all, as has been cited by the defendant, Congress, alone, has the power

> "to dispose of and make all needful rules and regulations respecting the territory or to other property belonging to the United States." (Constitution, Article IV, Section 3.)

California was and is, therefore, required to submit proof of how and under what laws, title was acquired, before relying on precedents, which are inapplicable, in the hope of creating a non-existent right or title.

Without proof of title, the question raised is purely academic and presents no question which would warrant a rehearing of the majority opinion.

The defendant presents, as Argument V, the following proposition:

> "A rule of property law has been established by the repeated dicta and decisions of this Court for the last 100 years, on the faith of which innumerable titles have vested, and the rule should not now be rejected by the Court."

This assertion suggests the majority opinion has disregarded the rule of property law, which has been followed by this Court for at least 100 years. This rule was not established upon mere allegations of title, for which there were no legal foundations. The citations and arguments could avail much in any case, which had its foundations in a legal title. Under the present situation, however, California has submitted no proof of such title, as would justify the Court in applying the rules of property law quoted. The people of the defendant state, for the most part, have not been misled by the claims of the defendant in this action. They have been fully informed from the date of adoption of the State constitution in 1850, of lack of title; they have even more recently been upon notice by the act of the legislature of the State of California of 1929. It is believed that the arguments advanced in support of the contentions of the defendants, as made in this case, are being made on behalf of a very small and select group who are reported to be financially interested in the results. The proposition becomes purely academic, when lacking the foundation of legal title and presents no question for the consideration of the Court.

As a further point, in seeking a rehearing of the majority opinion, the following proposition is offered by the defendant:

> "Prescription and acquiescence: The majority opinion in its treatment of the subjects of prescription and acquiescence, has deprived the State of its sovereignty and relegated it to the position of a private individual.

"(A) Title to the entire area is in California on the doctrine of prescription.

"(B) In the alternative, title to the area actually occupied, granted, leased, or improved, is in the State, its grantees, lessees, and licensees, under the doctrine of prescription."

The defendant is well aware that the doctrine of prescription and acquiescence does not run against the Federal Government.

> "No title can be acquired by adverse possession against the United States." *Stull* v. *United States*, 56 Fed. 2, 340.
>
> "There is no way for title to land to be devested out of the United States accept in strict persuance of some law of United States; and, as no statute of limitation runs against the United States, occupancy and possession alone, even for a great length of time, cannot ripen into title as against the United States." *Drew* v. *Valentine*, 18 Fed. 713.
>
> "No prescriptive title can be obtained to public lands belonging to the United States." *Northern Pac. Ry. Co.* v. *McComas*, 250 U. S. 387; *U. S.* v. *Dastervignes*, 122 Fed. 30.

The defendant is also advised by decision of its own Supreme Court in the case of *Patton* v. *City of Los Angeles*, 159 Cal. 521, that the same law is followed by their own State.

The defendant also has an erroneous idea as to the difference between State political sovereignty and ownership of private property. We quote from the decision given by Chief Justice Field, speaking for the State Supreme Court of California, as follows:

> "To the existence of this political authority of the State —this qualified sovereignty, or to any part of it—the ownership of the minerals of gold and silver found within her limits is in no way essential. The minerals do not differ from the great mass of property, the ownership of which may be in the United States, or in individuals, without affecting in any respect the

> political jurisdiction of the States. They may be acquired by the State, as any other property may be, but when thus acquired, she will hold them in the same manner that individual proprietors hold their property, and by the name right: by the right of ownership, and not by the right of sovereignty." *Moore* v. *Shaw*, 17 Cal. 199.

The defendant is attempting to claim by State political authority what it could only acquire as an individual proprietor.

The final argument, which the defendant advances, is as follows:

> "The alleged distinction between inland waters and the marginal sea has no constitutional or statutory basis nor any basis in reason, and is created for the first time by the majority opinion herein."

The question advanced by the defendant under this argument, is fully answered by the action taken by Congress, when it appropriated all of the territory, which included the marginal belt or sea along the coast of California, by the Act of 1851. As far as the present litigation is concerned, it was, and is not necessary that Congress or this Court should make any distinction between the inland waters and marginal sea, for the disposition of the property of the United States lies within the power of Congress, alone, and unless title to the marginal sea or belt and the inland waters was secured by the selection of these waters and lands by the legislature of California; so far as the opinion of this Court is concerned, the points are immaterial, and offer no basis for any reconsideration of the opinion of this Court.

CONCLUSION.

It is respectfully submitted that before the defendant is permitted a rehearing and reconsideration of the majority opinion in the instant case, that the fundamental and basic

rights of the defendant be established. This basic right is predicated on the defendant having received, from the Government, under some general law or Act of Congress, a valid and unassailable title to the submerged lands, marginal sea or belt, and the minerals in them.

It has been pointed out that the only ways by which the defendant could establish such a valid title, would be under the Act of 1841, or the Act of 1851, or by special acts of Congress conveying specific rights to the defendant. It has also been established that defendant has failed to do so.

It appears that under the Act of 1841, the defendant can establish no claim to title to the lands and waters covered by the instant litigation as they were never selected by the legislature of California after survey. This point was fully considered in the opinion of this Court in the case of *U. S.* v. *Wyoming*, decided in June of this year; and, the Court said, in that case, on Page 13 of the Advance Sheet Opinion:

> "It is significant that for a period extending over half a century, the land decisions of the Department of the Interior have consistently taken the position that title to unsurveyed school sections passes to the State only upon completion of the survey, * * * Many of those decisions involved statutory language substantially identical to that in the Wyoming Enabling Act. We should be slow at this late date to upset the ruling * * * of the Department of the Government to which is committed the administration of public lands."

The claim of the defendant to an interest and title to the land and waters in suit, under the provisions of the Enabling Act, are likewise unproved and untenable. This Court in the case of *United States* v. *Wyoming*, cited above, states, with reference to the question of the rights of the State of Wyoming to certain unsurveyed lands which Wyoming claims were granted to it under the Enabling Act:

> "The interest of the State vest at the date of its admission into the Union *only* as to *those sections which*

are surveyed at that time and which previously have not been disposed of by the Federal Government." Citing in support thereof, *Wisconsin* v. *Lane*, 245 U. S. 427; *U. S.* v. *Stearns Lumber Co.*, 245 U. S. 436.

The Court, in continuing its opinion, on Page 14 of the Advanced Sheet Opinion, states:

"For the reason stated above, we hold that at the date of her admission to the Union, Wyoming acquired no such interest in the lands in issue that could not be defeated * * * by the Federal Government acting prior to survey."

The opinion of the Court in the Wyoming Case is based upon the provisions of the Law of 1841 which grants to the State title to land *only after it has been surveyed.* This finding definitely precludes any claim of the defendant to any particular land or waters in issue under the Enabling Act, as the title to any property in that State would vest only as to property *surveyed* at the time of the passage of the Enabling Act.

It is believed that the ruling of this Court, in the Wyoming Case, definitely fixes the title to the marginal sea and the submerged lands, as well as to the minerals in them, in the Federal Government, and ownership, in a proprietary sense, of all of those lands and waters irrespective of any provisions of International Law, upon which the opinion of the Court in the instant case was largely based, and affords the Court the opportunity if it so desires, to include in the decree, which is to be entered in the instant case, a finding as to the absolute property rights of the Federal Government, as sole owner. The complaint of the Government alleges that the fee simple title to the property in issue is in the United States. Under the law, as presented, it is believed that there can be no question as to the right of the Government to ownership of the lands and waters in issue, in fee simple.

The defendant in its several arguments, presents no questions which are vital to the decision of this Court on the basic proposition of ownership, and there appear to be no grounds advanced by the defendant which warrant or would justify a rehearing and reconsideration of the majority opinion. The majority opinion was founded upon the principle of International Law as well as the Statutes of the United States, and the decisions of the Court in matters affecting the interpretation of those laws, which are uniform in all cases involving the questions raised in the instant case.

For the foregoing reason, the petition for rehearing should be denied.

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